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No. 79-1345

In the Supreme Court of the United States

OCTOBER TERM, 1979

RONALD KORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court and the court of appeals erred in finding that the circumstances of this case justified a warrantless entry of petitioner's residence to prevent the destruction of contraband pending arrival of a search warrant.

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on one count of conspiracy to possess and distribute 1,000 grams of cocaine (21 U.S.C. 846), and on two counts of possession with intent to distribute cocaine (21 U.S.C. 841(a)(1)). He was sentenced to four years' imprisonment. The court of appeals affirmed, with one judge dissenting (Pet. App. 15-36).

1. The evidence at trial, which is fully set out in the opinion of the court of appeals, showed that petitioner participated in a conspiracy to distribute cocaine that had been imported from Bolivia. In March 1978, Jack Blanchard was arrested at a Miami airport while transporting 982 grams of cocaine from Bolivia (Pet. App. 17). At the time of his arrest, Blanchard agreed to assist federal agents in identifying the intended purchaser of the cocaine (*ibid.*). Co-defendant John Keith DeSmyter had instructed Blanchard to take the cocaine to Detroit and, should DeSmyter be unavailable, to contact Donald Turner, a Detroit attorney (*ibid.*).[1] Acting under the direction of DEA agents, Blanchard went to Detroit with a suitcase that had been outfitted with a "beeper" and contained a small amount of cocaine (*ibid.*). Once in Detroit, Blanchard contacted Turner, who directed him to a motel (*id.* at 17-18). Blanchard told Turner that he was waiting for someone to pick up a suitcase of "stuff" (*id.* at 18). Although Turner told Blanchard that he did not want to know what was going on, he said that he had recently introduced a friend to DeSmyter, that they had "got[ten] along pretty well together," and that the friend wanted to "get together" with DeSmyter again (*id.* at 18-19). Later that same day, Turner told Blanchard that his "friend," who was apparently expecting the courier's arrival, would come to Blanchard's room and identify himself as "Sonny" (*id.* at 19). Shortly thereafter, petitioner came to Blanchard's motel room, identified himself as "Sonny," and took possession of the suitcase.

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[1]DeSmyter committed suicide before trial. Turner was convicted at a separate trial, but prevailed on a motion for new trial. His second trial is now pending.

When petitioner left Blanchard's motel room, he met an unidentified male who walked petitioner to his car (Pet. App. 19). After petitioner had placed the suitcase in the trunk of his car, the unidentified male went to another car and, when petitioner drove away, the unidentified male followed him in what appeared to be countersurveillance (*ibid.*). The two cars stopped a few miles away and the two men conferred briefly before petitioner drove home alone (*id.* at 32). DEA agents, who had been monitoring the two cars, followed petitioner to his home, where three or four other cars were parked (*id.* at 19). Within a few minutes of his arrival, petitioner left his house and sped away in his car. He was arrested about 400 yards from his house, but the suitcase was not in the car (*id.* at 19-20, 29). When petitioner refused permission to search his house, the agents went to the house, knocked, and were admitted by petitioner's wife (*id.* at 29-30). The agents made a "protective sweep" of the house to insure that no one but petitioner's wife and children were present (*id.* at 30). While the agents did not seize anything during the "protective sweep," they observed various narcotics paraphernalia and the jacket that petitioner had worn during his visit to Blanchard's motel room (*ibid.*). Noticing a bulge in the jacket pocket, the agents checked to make sure that the pocket did not conceal a gun, whereupon they discovered a large wad of cash and notes linking petitioner with DeSmyter and Turner (*ibid.*). The agents immediately telephoned a federal prosecutor to assist them in preparing a search warrant affidavit, and the observations they made during the "protective sweep" were subsequently incorporated in the warrant (*id.* at 23, 30). One agent remained at the house while the others secured the warrant (*ibid.*).

2. Petitioner contends (Pet. 6-13) that the courts below improperly upheld the agents' entry to secure petitioner's house pending receipt of a search warrant.[2] However, both courts found that the agents were confronted with exigent circumstances justifying their limited entry, and that factual finding requires no further review. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). Moreover, the record amply supports the courts' finding.

At the time of the warrantless entry, petitioner had been arrested while apparently fleeing his house. The agents had observed three or four cars parked at the house, however, and they did not know who else might be present or where the cocaine was located (see Pet. App. 21). As the court of appeals noted (*id.* at 25-26), "the DEA agents were confronted with dealers in narcotics and conspirators caught red-handed. The narcotics were worth a large sum of money when processed for sale at destination. The dealers in narcotics are well known to be dangerous criminals usually carrying weapons." The agents reasonably suspected that someone else in the house might discover petitioner's arrest and destroy the cocaine (see Pet. App. 21). In addition, the warrantless entry was itself limited to a quick sweep to determine that no one but petitioner's wife and children were present, and the agents immediately set about securing a search warrant. In these circumstances, the entry was justified. *United States* v. *Glasby*, 576 F. 2d 734, 737-738 (7th Cir.),

[2]Petitioner contests (Pet. 7) only the district court's finding that exigent circumstances existed here; he does not question the right of officers to enter without a warrant when such circumstances are present.

cert. denied, 439 U.S. 854 (1978); *United States* v. *Gardner*, 553 F. 2d 946, 948 (5th Cir. 1977), cert. denied, 434 U.S. 1011 (1978); *United States* v. *McLaughlin*, 525 F. 2d 517, 521 (9th Cir. 1975), cert. denied, 427 U.S. 904 (1976).[3]

Even assuming that the entry was not justified, however, it is clear that the district court's refusal to suppress the evidence discovered during the "protective sweep" would be harmless error. As petitioner himself points out (Pet. 5), the cocaine-filled suitcase was not discovered during the "protective sweep" of the house, but was subsequently found during the warrant search "underneath a hedge in the backyard some seventy to eighty feet from the house." Seizure of this critical evidence thus had a wholly independent and lawful source and was not a fruit of the entry into the house. At trial, moreover, the informant Blanchard testified fully as to his dealings with petitioner and his co-conspirators. Given the admissibility of the cocaine, the evidence secured through the cooperation of Blanchard, and the observations of the DEA agents during their painstaking surveillance of petitioner, the indisputably untainted evidence of petitioner's guilt was overwhelming. *Chapman* v. *California*, 386 U.S. 18 (1967).

[3]Petitioner's reliance (Pet. 11) on *United States* v. *Davis*, 423 F. 2d 974 (5th Cir. 1970), is misplaced. In that case, the warrantless entry occurred more than three hours after the defendant's arrest and constituted a full-blown search, unlike the timely protective sweep that the agents undertook in this case. Furthermore, to the extent that petitioner argues (Pet. 11-12) that the present case represents a departure from prior Sixth Circuit precedent, it is well-established that intra-circuit conflicts do not merit review on certiorari. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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